

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF WASHINGTON

3

4 ZACKLIFT INTERNATIONAL, INC., a
5 Washington corporation,

6 No. CV-08-3025-FVS

7 Plaintiff,

8 ORDER GRANTING MOTION TO
9 TRANSFER VENUE

v.

10 ROGER D. KOOMIA, d.b.a., TRIPLE K
11 INDUSTRIES,

12 Defendant.

13 **THIS MATTER** came before the Court on the parties' joint request
14 for an order transferring venue to the United States District Court
15 for the District of South Dakota, Southern Division. (Ct. Rec. 21).
16 Plaintiff is represented by Brian G. Bodine and Brian N. Platt.
17 Defendant is represented by Christine Lebron-Dykeman and John
18 Christopher Lynch.

19 **BACKGROUND**

20 On April 1, 2001, Defendant brought suit against Plaintiff for
21 infringement of certain patents in the United States District Court
22 for the District of South Dakota, Southern Division. The patents
23 related to a fifth-wheel towing device. Plaintiff made a "Fifth-
24 Wheeler" for which Defendant claimed infringement of claims.

25 Pursuant to a Settlement Agreement executed by the parties on
26 December 23, 2002, the United States District Court for the District

1 of South Dakota, Southern Division, entered a Consent Order which,
2 among other items, indicated that the South Dakota Court retained
3 exclusive jurisdiction to enforce the Consent Order and Settlement
4 Agreement.

5 In 2008, Plaintiff began selling a new Fifth-Wheeler which
6 Defendant believes to be an infringement of its patents and in
7 violation of the terms of the Settlement Agreement and Consent Order.
8 (Ct. Rec. 10). Defendant contacted Plaintiff indicating its belief
9 that the new design was in violation. Thereafter, Plaintiff initiated
10 the instant action, in this Court, seeking a declaration that its new
11 Fifth-Wheeler design does not infringe Defendant's patents.

12 On September 19, 2008, Defendant moved to either dismiss the
13 complaint or to transfer venue to the United States District Court for
14 the District of South Dakota, Southern Division. (Ct. Rec. 9).
15 Defendant argues in its motion to dismiss that because any final
16 determination of the current dispute requires an interpretation of the
17 terms of the 2002 Settlement Agreement and the 2003 Consent Order and
18 because under the terms of the Settlement Agreement and Consent Order,
19 the South Dakota Court retains exclusive jurisdiction for enforcement,
20 this action should be transferred to the South Dakota Court. (Ct.
21 Rec. 10).

22 The parties have now jointly moved the Court to transfer the
23 action to the United States District Court for the District of South
24 Dakota, Southern Division, and to dismiss, without prejudice,
25 Defendant's motion to dismiss. (Ct. Rec. 21).

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1 **DISCUSSION**

2 **I. LEGAL STANDARD**

3 A district court may transfer venue of any civil case to another
4 district court where the action could have been brought "for the
5 convenience of the parties and witnesses, in the interest of justice."
6 28 U.S.C. § 1404(a). Pursuant to 28 U.S.C. § 1406(a), "[t]he district
7 court of a district in which is filed a case laying venue in the wrong
8 division or district shall dismiss, or if it be in the interest of
9 justice, transfer such case to any district or division in which it
10 could have been brought." Section 1406(a) is predicated upon whether
11 or not venue is "improper" in the forum in which the case was brought.
12 *Continental Ins. Co. v. M/V Orsula*, 354 F.3d 603, 608 (7th Cir. 2003).
13 In the interest of justice, a federal court may transfer a case filed
14 in the wrong district to the correct district. See, 28 U.S.C. §
15 1406(a); *Starnes v. McGuire*, 512 F.2d 918, 932 (D.C. Cir. 1974).

16 **II. SECTION 1406(a)**

17 As noted by Defendant, pursuant to a Settlement Agreement between
18 the parties executed on December 23, 2002, the United States District
19 Court for the District of South Dakota, Southern Division, entered a
20 Consent Order which ordered that the South Dakota Court retained
21 exclusive jurisdiction to enforce the Consent Order and Settlement
22 Agreement. (Ct. Rec. 10). In 2008, Plaintiff began selling a new
23 Fifth-Wheeler which Defendant believes to be an infringement of its
24 patents and in violation of the terms of the Settlement Agreement and
25 Consent Order. Defendant contacted Plaintiff indicating this belief,
26 and, thereafter, Plaintiff initiated the instant action seeking

1 declaratory relief. Based on the foregoing, Plaintiff's case should
2 have been filed in the Southern Division of South Dakota. As noted
3 above, in the interest of justice, a federal court may transfer a case
4 filed in the wrong district to the correct district. See 28 U.S.C. §
5 1406(a); *Starnes*, 512 F.2d at 932 (D.C. Cir. 1974). Based on the
6 parties' stipulation, it is apparent that the parties agree that the
7 interests of justice require the transfer of venue. The stipulation
8 of the parties evidences their agreement that the proper venue is the
9 Southern Division of South Dakota.

10 The Court finds that the requested transfer of venue is
11 appropriate under Section 1406(a). Accordingly,

12 **IT IS HEREBY ORDERED:**

13 1. Defendant's Motion to Dismiss or in the Alternative to
14 Transfer (**Ct. Rec. 9**) is **dismissed without prejudice** to Defendant's
15 filing a motion to dismiss in the Southern Division of South Dakota.

16 2. Venue of this action is **TRANSFERRED** to the United States
17 District Court for the District of South Dakota, Southern Division.

18 3. Each party shall bear its own costs and attorneys' fees in
19 this matter.

20 **IT IS SO ORDERED.** The District Court Executive is hereby
21 directed to enter this order, furnish copies to counsel and **close the**
22 **file.**

23 **DATED** this 6th day of October, 2008.

24 _____
25 **S/Fred Van Sickle**
26 Fred Van Sickle
Senior United States District Judge